There are other cases apart from the above where the courts considered section 173(h) and the learned Judges all seemed to be of the opinion that the section imposes on the Subordinate Courts a duty to consider the charge and to amend it if necessary. With respect I agree with his Lordship Spenser Wilkinson J. that the section does not make it incumbent on the court to search the law for offences which an accused person may have committed. I would venture furrther by saying that the learned President or Magistrate has a discretion not to amend the charge when to do so would be unjust or an accused person would be prejudiced by such amendment. Whether this is so would depend on the circumstances of each case. However where the facts do not establish a *prima facie* case against the accused person on the charge preferred against him but disclose another offence for which he is not charged, the learned President or Magistrate unless he has a good reason not to do so, ought to amend the charge. In the present case the facts as found by the learned Magistrate would point clearly to an offence of cheating having been committed and the learned Magistrate has not given any reason as to why he did not amend the charge.

It is contended by Mr. Robertson that it would be unjust in the present case to have the charge amended from section 3(a)(ii) of the Prevention of Corruption Act to section 420 of the Penal Code as the latter carries a heavier punishment, a maximum of 7 years' imprisonment and a fine. The learned Deputy Public Prosecutor drew the attention of the court to section 13 of the Provision of Corruption Act which makes it mandatory for the court to order an accused who has been found guilty to pay to the Government the sum which he has received and this is a fine which can be converted into a term of imprisonment in default. He says that this and a maximum sentence of 5 years imprisonment under section 3(a)(ii) of the Prevention of Corruption Act would make the offence a more serious one than the offence of cheating. By making such comparisons both Mr Robertson and the learned Deputy Public Prosecution assumed that in either case the maximum sentence would be imposed by the subordinate court. With respect I do not think we can do that. I see no reason why the court in the presence case cannot amend the charge from section 2(a)(ii) of Prevention of Corruption Act to one of cheating under section 420 of the Penal Code. I do not think that this would cause any injustice to the accused.

For reasons given above the appeal ought to be allowed. Accordingly the learned trial Magistrate is hereby directed to amend the charge against the respondent to one of cheating and the trial to proceed on the amended charge.

Order accordingly.

Solicitors: *Skinner, Lind, Robertson, Pang & Willie.*

FLORENCE BAILES v. DR. NG JIT LEONG

[O.C.J. (Ajaib Singh J.) June 14, 1983]
[Penang – Civil Suit No. 209 or 1981]

Practice & Procedure – Res judicata – Plaintiff obtained interim injunction against defendant – Hearing by another High Court which vacated interim injunction – Whether this amounted to res judicata – Present court held presiding Judge was not functus officio and therefore not precluded from hearing case.

The plaintiff in this case sought a declaration that a 3 months' suspension imposed on her by the Penang Club was null and void. She also sought an injunction to restrain the Committee of the Penang Club from enforcing the suspension. She claimed damages and costs. On June 8, 1981 the plaintiff obtained an interim order restraining the Committee from enforcing the suspension until the trial of her suit. This order was vacated by the late Arulanandom J. on July 7, 1982 (see [1982] 1 M.L.J. 333). In his grounds of judgment the learned Judge went deeper into the matter and made findings which appear to cover all the issues involved in the suit. An appeal was lodged with the Federal Court by the plaintiff but as the 3 month period of suspension had ended the appeal was struck off on the application of counsel for the defendant.

Counsel for the defendant argued that the court could not entertain the plaintiff's suit against the defendant on two preliminary points, *res judicata* and *functus officio*.

Held: (1) the hearing and arguments during the interim injunction stage were not exhaustive for the determination of the issues involved in the suit. The plea of *res judicata* should therefore not prevail and that in the interest of justice there should be a full hearing of the suit itself;

(2) the presiding Judge who would hear the present suit was not *functus officio* and therefore not precluded from hearing the case.

(3) the plea *res judicata* had not been pleaded by the defendant and therefore could not be raised as a preliminary objection to the hearing of the plaintiff's suit.

CIVIL SUIT.

R. J. Manecksha for the solicitors.
N. Chandran for the defendant.

Cur. Adv. Vult.

Ajaib Singh J.: Mr. N. Chandran for the defendant has raised two preliminary points – *res judicata* and *functus officio* – and submits that on both or either of these points the court cannot entertain the plaintiff's suit against the defendant.

In her writ of summons the plaintiff sought a declaration that a three months' suspension imposed on her by the Penang Club was null and void and she also sought an injunction to restrain the Committee of the Penang Club from enforcing the suspension. She also claimed damages and costs.

Pending the hearing of the suit the plaintiff obtained an interim order on June 8, 1981 restraining the Committee from enforcing the suspension until the trial of her suit. This order was vacated by another order of the High Court on June 25, 1981. So the position at this stage was that the Civil Suit filed by the plaintiff remained to be heard and determined by the court.

However in the grounds of judgment dated July 7, 1981 [1982] 1 M.L.J. 333) in support of vacating the interim order Arulanandom J. went deeper into the matter and made findings which appear to cover all the issues involved in the suit. An appeal was lodged with the Federal Court by the plaintiff but as the three month period of suspension had ended the appeal was struck off on the application of counsel for the defendant. At the hearing before me on the preliminary points Mr. R. J. Manecksha for the plaintiff said from the Bar that when the Federal Court appeal was struck off the judges sitting in the Federal Court had indicated that the matter should go back to the High Court for determination of the issues involved in the Civil Suit.

I think it may not be an unreasonable inference to draw from all the facts and circumstances leading to the interim injunction and subsequently to the order vacating the interim injunction that the parties had confined themselves to the issue only of the interim injunction and not to the suit as a whole. Thus the hearing and arguments during the interim injunction stage were not exhaustive for the determination of the issues involved in the suit. In view of all these matters it seems to me that the plea of *res judicata* should not prevail and that in the interest of justice there should be a full hearing of the suit itself. For this reason too I hold that the presiding judge who would now hear this suit is not *functus officio* and therefore not precluded from hearing the case.

Another reason why the plea of *res judicata* should fail is that it was not pleaded. It is true that the defendant was not in a position to consider setting up the plea of *res judicata* until he had received the written grounds of judgment of Arulanandom J. but it was open to him thereafter to amend his pleadings or to set up the plea by formal application supported by affidavit. But this was not done. Under 0.33 r. 2 of the Rules of the High Court the court may order that a preliminary point of law which has been pleaded be heard and determined before the actual hearing of the suit. This may be done even if the point of law is not pleaded but in such an event a point of law would be ordered to be heard as a preliminary issue only if the point of law is discernible in the pleadings or which has otherwise arisen in the suit itself. This is not so in the present case and as the plea of *res judicata* has not been pleaded it cannot be raised as a preliminary objection to the hearing of the plaintiff's suit.

Under O. 33 r. 2 and r. 3(2) the court may order a preliminary question of law to be tried before the trial of the suit proper but it is to be noted that before such question of law can be thus tried the court must first make an order to this effect. In the present case no such order was made by the court and the preliminary points were raised somewhat casually by counsel for the defendant.

In the circumstances therefore I rule against the preliminary issues brought up by the defendant and direct that this case be heard on the merits.

Order accordingly.

Solicitors: *Lim Kean Siew & Co.; Presgrave & Matthews.*